88-617

Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1988

YORK BANK & TRUST COMPANY,

Petitioner,

v.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al.,

Respondents

Petition For a Writ of Certiorari to The United States Court of Appeals For The Third Circuit

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QUESTIONS PRESENTED

I. WHETHER CONGRESS HAS GRANTED TO THE FSLIC, AS INSURER, THE EXCLUSIVE AUTHORITY TO ADJUDICATE INSURANCE CLAIMS OR WHETHER CONGRESS HAS GIVEN THE COURTS THE RIGHT TO ADJUDICATE INSURANCE DISPUTES BETWEEN THE FSLIC AND INSURED DEPOSITORS?

II. IF A CHALLENGE TO AN INSURANCE DETERMINATION OF THE FSLIC IS LIMITED TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT, DID THE THIRD CIRCUIT COURT OF APPEALS ERROR IN HOLDING THAT REVIEW UNDER THE APA IS LIMITED TO AN ARBITRARY AND CAPRICIOUS STANDARD GIVEN THE LACK OF FACT FINDING PROCEDURES UTILIZED BY THE FSLIC?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, P.V. ANDERSON and FIRST UNITED FUND LIMITED were parties in the proceedings below. The action has been dismissed as to those parties and they are not involved in the issues raised in this petition nor were they involved in the appeal to the Third Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner York Bank & Trust Company respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on June 29, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. *infra.*, A-1–A-19) is reported at 851 F.2d 637 (3rd Cir. 1988). The opinion of the District Court (App. *infra.*, A-22–A-31), is reported at 637 F. Supp. 1045 (M.D. Pa. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1988. An Order denying the Petition for Rehearing was entered on August 1, 1988. (App. *infra.* A-20). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

12 U.S.C. §§1724, 1725(c) and §1728.

The text of the foregoing provisions is reprinted in the appendix hereto, Pages A-32–A-38 *infra.*

STATEMENT OF THE CASE

A. Statement of Facts:

Petitioner, York Bank & Trust Company (hereinafter referred to as "York Bank") is a banking corporation chartered under the laws of the Commonwealth of Pennsylvania. Between October 5, 1983 and December 30, 1983, York Bank purchased five certificates of deposit from Empire Savings and Loan of Mesquite, Texas (hereinafter referred to as "Empire") with a total face value of $1,241,000. The accounts at Empire were insured by the Federal Savings and Loan Insurance Corporation (hereinafter referred to as "FSLIC") pursuant to 12 U.S.C. §1724. The funds used to purchase these certificates of deposit were from trust accounts and pension plans and therefore were entitled to insurance for the full amount since no single individual had a beneficial interest of more than $100,000. *See* 12 U.S.C. §1724. The certificates of deposit were registered in the name of Yorst and Company, the nominee name of the trust department of York Bank. The

accounts were designated Yorst & Company c/o York Bank and Trust Company.

On or about March 14, 1984, Empire was placed into receivership by the FSLIC. On March 15, 1984 York Bank filed a claim with the FSLIC for recovery of the insurance provided by 12 U.S.C. §1728. However, FSLIC denied the claim except for $100,000. The claim was denied by special counsel to the FSLIC, David Taylor, by letter dated May 4, 1984. Pursuant to procedures adopted by the FSLIC, York Bank filed for reconsideration on November 16, 1984.

In the Petition for reconsideration filed with the FSLIC, York Bank argued that since the funds used to purchase the certificates of deposit were from trust and pension accounts, and no single individual had more than $100,000 beneficial interest in the certificates of deposit, the certificates were entitled to full insurance. On June 20, 1985 the deputy director of the FSLIC, Brian Neuberger, denied York Bank's request for reconsideration and stated that the five certificates of deposit would be aggregated and payment of insurance would be in the total amount of $100,000. The major reason given by deputy director Neuberger for denial of the insurance claim (except for $100,000) was that the records of Empire failed to disclose the trust relationship. The FSLIC made this determination without a hearing, without identifying the issues or allowing York Bank to rebut the FLSIC's claim of lack of evidence.

Prior to the receivership, York Bank had sent a letter to Empire disclosing the nature of the funds used to purchase the certificates of deposit by Yorst and Company. The FSLIC was unable to find the letter in the records of Empire which York Bank understands to be in disarray. There is no indication in the record of what steps, if any,

the FSLIC used to locate the letter. The FSLIC deliberately failed to request or allow York Bank to present all testimony and documentary evidence that the letter was sent and received by Empire. The FSLIC also failed to allow evidence to clarify the meaning of Yorst and Company c/o York Bank.

York Bank initiated the within law suit on March 12, 1986 to recover the full insurance owed by the FSLIC on the five certificates of deposit purchased at Empire. Prior to and since June 20, 1985, the FSLIC has arbitrarily and without a proper factual basis or appropriate proceedings, treated plaintiff in its claims as mere creditors of Empire, denying them the full insurance FSLIC is obligated to pay under 12 U.S.C. §1724.

B. Proceedings in the Court Below:

York Bank and Trust Company filed suit in the United States District Court for the Middle District of Pennsylvania against the FSLIC, P.V. Anderson, Inc. and First United Fund Limited, Inc.[1] Jurisdiction of the District Court was under 28 U.S.C. §1331 and 1346, and 12 U.S.C. §1728(c).

The claim against the FSLIC was that the FSLIC failed to pay insurance to York Bank on accounts York Bank held in Empire after the failure of Empire pursuant to 12 U.S.C. §1724.

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[1]The claims against P.V. Anderson and First United Fund Ltd, Inc., were resolved between the parties and the action was dismissed against them by Order of Court dated September 8, 1987. Jurisdiction of the District Court on the claims against P.V. Anderson, Inc. and First United Fund Limited was based on 28 U.S.C. §1331 and the pendant jurisdiction of the Court.

The FSLIC filed an Answer to the Complaint. The FSLIC then moved to dismiss the Complaint against them based on lack of subject matter jurisdiction. After briefing, the Court entered an opinion and dismissed the federal defendants as parties to this law suit.

On September 8, 1987, the Court entered an order dismissing the case as to the remaining defendants. An appeal to the United States Court of Appeals for the Third Circuit followed and was filed on November 5, 1987.

On June 29, 1988 the United States Court of Appeals for the Third Circuit entered an opinion vacating the judgment of the District Court and remanding for review of the insurance determination of the FSLIC under the APA. The Third Circuit did not order the *de novo* hearing requested by the Petitioner and mandated by Congress. A timely petition for rehearing was denied by the Third Circuit with three judges dissenting. (App. *infra.*, p. A-20).

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues of Exceptional Importance.

This case presents issues of national importance. At stake are the savings of millions of Americans. Insured depositors have been denied and will be denied in the future any meaningful judicial redress because of the actions of the FSLIC and the erroneous decision of the Third Circuit.

In response to the stock market crash of 1929 and the Depression of the 1930's, Congress passed legislation to restore the banking system of the United States.

> The stock market crash of 1929 and the Great Depression of the 1930's resulted in the almost total collapse of the Nation's banking system, with the result that a

> large part of the public ceased placing their money in banks, and banks were unable to extend credit. To restore depositor confidence and stimulate economic growth, Congress in 1933 established the Federal Deposit Insurance System for eligible banks, and created the FDIC to administrate it. Banking Act of 1933, ch. 89, 48 Stat. 162 (1933). The statutory provisions currently governing the FDIC were enacted in the Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, 64 Stat. 873 ("FDIA"). In 1934, Congress established the Federal Savings and Loan Insurance Corporation ("FSLIC"), which operates under the management and direction of the . . . [Federal Home Loan Bank Board], *see* 12 U.S.C. §1725(a)(1982), to provide similar protection for eligible savings and loan associations. National Housing Act ("NHA"), ch. 847, 48 Stat. 1246 (1934).

FAIC Securities, Inc. v. United States, 768 F.2d 352, 355 (D.C. Cir. 1985). York Bank & Trust Company now seeks to recover the insurance owed to them by the FSLIC under the Acts passed to restore the confidence and stability of the national banking system. The decision of the Third Circuit undermines the clear intent of Congress to restore confidence in the National Banking System.

With an ever growing number of bank failures, the manner in which depositors can challenge insurance determination grows in importance. Pursuant to numbers available from the Federal Home Loan Bank Board, there have been approximately 575 Bank failures since 1985 and failures of approximately 65 Savings and Loans. In addition, during the same period, approximately 170 Savings and Loan Associations have been merged with FSLIC's assistance. If the decision of the Third Circuit is permitted to stand, depositors will have insurance disputes adjudicated

by the FSLIC, and not courts as envisioned by Congress. The FSLIC cannot be impartial in these determinations and certainly will not be perceived as impartial by the American public. The restoration and the maintenance of the American banking system with the ever growing number of failures is greatly hampered and frustrated by the Third Circuit decision.

The issues raised in this Petition go well beyond the rights of the parties to this litigation and will effect the rights of all depositors of failed federally insured savings and loan associations.

This Court has granted certioriari to resolve the issue of whether Congress has granted FSLIC, as a receiver, the exclusive authority to adjudicate the validity of state law causes of actions asserted against failed savings and loan associations under an FSLIC receivership. *Coit Independence Joint Venture v. FSLIC,* U.S. 108 S. Ct. 1105, 56 U.S.L.W. 3608 (1988). This petition presents the second half of the equation: Whether Congress has granted the FSLIC, as an insurer, the exclusive authority to adjudicate the validity of insurance claims asserted against the FSLIC as insurer of a failed savings and loan association. This petition should also be granted so this Court can now resolve the procedures for challenging decisions of the FSLIC as insurer of a failed savings and loan association.

II. The Third Circuit Determination is in Conflict with the View of the Ninth Circuit.

The Third Circuit's holding that insurance determinations of the FSLIC can only be reviewed by a District Court under the provisions of the Administrative Procedure Act, 5 U.S.C. §701 et seq., is in conflict with the view of the Ninth Circuit.

In *Jugum v. FSLIC,* 637 F. Supp. 1045 (W.D. Wash. 1986)[2] the District Court held that the FSLIC can be sued in a District Court on an insurance claim and the Court should decide the action on an independent review of all of the evidence. The Court in *Jugum* granted a *de novo* hearing to depositors challenging the FSLIC insurance determination.

The decision in *Jugum* was cited with approval by the Ninth Circuit in *Morrison-Kundsen Company v. CHG International, Inc.,* 811 F.2d 1209, 1220 (9th Cir. 1987). In *Morrison-Kundsen Company* the Court stated that §1728(c) "indicates unambiguously that Congress anticipated judicial adjudication in the event of a disputed claim." *Id.* at 1220. The Court adopted this position in holding that creditors claims are also to be adjudicated in the Courts, and not by the FSLIC.

In *Godwin v. FSLIC,* 806 F.2d 1290, 1292 (5th Cir. 1987), the Court indicated that the Fifth Circuit has adopted the position of the Third Circuit.

Presently, the remedies available to a depositor of a failed savings and loan insurance company challenging an insurance determination will depend on the circuit in which the suit arises. The decisions in *York Bank, Hudspeth,* and *Godwin* lead to an inevitable conclusion that the Circuit Courts are split as to the manner and procedure for challenging insurance determinations of the FSLIC. This Petition should be granted in order for this Court to

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[2]The Opinion of the District Court was vacated as moot by the Ninth Circuit, *Jugum v. FSLIC,* No. 87-3517 (9th Cir. July 21, 1987), only after the parties reached an amicable settlement to their dispute during the pendency of the appeal. The order vacating the decision as moot did not disturb or criticize the reasoning of the District Court.

resolve this dispute and give all depositors of failed savings and loan associations the full rights accorded by Congress.

III. The Third Circuit Improperly Decided the Issues Raised in this Petition.

A. Erroneously Limited Challenges to Insurance Determinations by the FSLIC to Review Under the APA:

In limiting insurance disputes with the FSLIC to review under the Administrative Procedure Act, the Third Circuit failed to effectuate the clear intent of Congress.

The decision of the Third Circuit, with Judge Stapelton dissenting in part, held "that determinations made by the FSLIC in regard to insurance of depositor's accounts are judicially reviewable under the provisions of the Administrative Procedure Act." *York Bank & Trust Company v. FSLIC, et al.*, 851 F.2d at 641; (App. *infra.* at A-11). The decision limiting review of insurance determinations of the FSLIC to review under the APA is in clear contradiction of the express intent of Congress.

Section 1728(c) of Title 12 of the United States Code provides:

> (c) Statute of Limitations. No action against the Corporation to enforce a claim for payment of insurance upon the insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservitor, receiver, or other legal custodian of the insured institution shall recognize such insured account as a valid claim against the insured institution and a claim for payment of insurance shall have been presented to the Corporation and

> its validity denied, in which event the action may be brought within two years from the date of such denial.

The FSLIC also has the power to sue or be sued in any court of competent jurisdiction in the United States. 12 U.S.C. §1725(c)(4). Furthermore, §1728(b) provides that the FSLIC may require a judicial determination of liability prior to paying any insurance claim. These provisions, 1728(b) and (c) and §1725(c)(4) demonstrate that Congress clearly intended to permit direct suits in United States District Courts by depositors of failed savings and loan institutions against the FSLIC for insurance payments. Notwithstanding the above statutory provisions, the Third Circuit held that an insurance determination of the FSLIC must be reviewed under the limited provisions of the APA.

The Third Circuit failed to find support in these provisions of the National Housing Act allowing the District Court to hold a *de novo* hearing. The panel discounted the persuasive reasoning of the Court in *Jugum v. FSLIC, supra.* which the Ninth Circuit in *Morrison-Knudsen Company v. CHG International, Inc., supra.* has cited with approval.

The Court in *Jugum v. FSLIC, supra.* held that the FSLIC can be sued in the District Court for an insurance claim and that a District Court should decide the action on an independent review of the evidence after hearing. The Court in *Jugum* stated several reasons in support of this determination.

The initial reason was that §1728(b) and (c) did not require exhaustion of administrative remedies. "Exhaustion of administrative remedies may well be required as a matter of judicial policy, but since the statute does not

even require presentation of a claim to the FSLIC, Congress could not have intended to limit courts to review under the APA of the FSLIC's denial of a claim." *Id.* at 1047.

The second factor was that §1728(c) used the word "action" and not "review," and provided a three year statute of limitations for bringing the action. The Court noted that other provisions of the National Housing Act used the word "review" or clearly indicated the time for seeking review is short as normally provided in review of administrative actions. *See e.g.* 12 U.S.C. §1464(d)(6)(A); 1464(d)(7)(A); 1725(j)(4); 1730(f)(2); 1730(j)(1); 1730(k)(3)(D).

Finally, the limited administrative proceedings available to depositors suggested that there is a right to independent evaluation of the evidence by the District Court. "Section 1728 does not require the FSLIC to conduct a hearing on claims for insurance or to follow any other proceedings in evaluating such claims." *Jugum v. FSLIC,* 637 F. Supp. at 1048. In the instant matter, there was no opportunity to present evidence or meaningful opportunity to challenge the factual findings made by the FSLIC.

For the above reasons, the Court in *Jugum* concluded that it was "not limited to review under the APA of the FSLIC's denial of insurance payments to the depositors. *Id.* at 1048.

Furthermore, Section 1728(c) allows suit to be commenced *immediately* after the failure of the savings and loan association. Congress clearly envisioned a quick determination by the District Court of insurance disputes, and not internal determinations and adjudication by the

FSLIC with limited review by the Courts. Congress provided for immediate suits to be brought in District Courts in order to effectuate its intent in restoring confidence and stability to the banking system.

In *Herbert v. National Credit Union Administration Board,* 663 F. Supp. 833 (E.D. Mo. 1987), the court faced similar issues presented in this petition under the Federal Credit Union Act. See 12 U.S.C. §§1751 *et seq.* Three account holders brought suit against the National Credit Union Administration Board (hereinafter referred to as "NCUAB") after they were denied insurance for accounts at a federal credit union which was closed due to insolvency.

Under 12 U.S.C. §1781(a), the NCUAB must "insure the member accounts of all Federal Credit Unions". The Federal Credit Union Act further provides: "The Board in its discretion, may require proof of claims to be filed before paying the insured accounts, and in any case where it is not satisfied as to the validity of a claim for an insured account, may require the final determination of a Court of competent jurisdiction before paying such claim." 12 U.S.C. §1787(c)(1). The NCUAB argued that review of an insurance claim was limited to an arbitrary review. The Court found no guidance in the legislative history of the Federal Credit Union Act or amendments thereto as to what Congress intended the appropriate standard of review to be. *Herbert v. National Credit Union Administration Board,* 663 F. Supp. at 839. The Court recognized that elsewhere Congress had channeled the review of some NCUAB decision to the Administrative Procedure Act. *See e.g.* 12 U.S.C. §1783(j). The Court held that the account holders were entitled to a de novo hearing and not

limited to an arbitrary and capricious review under the APA. *Id.* at 884.

The Court in *Herbert* found decisions involving insurance determinations under the FSLIC to be analagous and the court's reasoning in *Jugum, supra.* persuasive. Many of the reasons relied on by the Court in *Jugum* were similarly applicable under the Federal Credit Union Act, including that Congress expressly provided the NCUAB may "sue and be sued", and that the Federal Credit Union Act does not require exhaustion of any administrative remedies prior to bringing an action. *See Herbert v. National Credit Union Administration Board,* 663 F. Supp. at 843.

The Third Circuit rejected the above reasoning without explanation. The Court simply stated:

> Although the Court in *Jugum* relied heavily on the provisions of 12 U.S.C. §1728(b) and (c) to support its position that an aggrieved depositor was not limited to judicial review under the APA, we find no language in those provisions with authorized review under a different standard.

York Bank & Trust Company v. FSLIC, et al., 851 F.2d at 640, (App. *infra.* at A-7). As Judge Stapelton noted in his dissent, the majority opinion "does not and cannot attribute any other meaning to the statutory provisions". *York Bank & Trust Company v. FSLIC, et al.,* 851 F.2d at 643; (App. *infra.* at A-14) (Stapelton, J., dissenting).

The Third Circuit opinion, as well as the FSLIC, relied primarily on *Baskes v. FSLIC,* 649 F. Supp. 1358 (N.D. Ill. 1986) and *Godwin v. FSLIC,* 806 F.2d 1290 (5th Cir. 1987) in support of its decision that disputes as to insurance determinations are limited to review under the APA. However, in *Baskes* the plaintiff only sought review

of the FSLIC's denial of an insurance claim under the APA, and did not seek an independent de novo determination under 12 U.S.C. §1728(c). *Baskes v. FSLIC,* 649 F. Supp. at 1361. Therefore, the Court in *Baskes* did not specifically address the issues raised by the instant Petition and the Third Circuit's reliance on that was misplaced. The panel's reliance on *Godwin v. FSLIC, supra.* was also improper. In *Godwin v. FSLIC, supra.* the Court, stated that a separate panel of the Fifth Circuit in *North Mississippi Savings and Loan Association v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), *cert denied,* 474 U.S. 1054 (1986) found that any insurance determination is limited to review under the APA. However, the *Hudspeth* court dealt with the challenge by a former bank employee to the FSLIC's determination of a contract and the transfer of certain assets and liabilities. *Hudspeth* did not involve an account holder's challenge to the FSLIC's insurance determination. The Court in *Herbert v. National Credit Union Administration Board,* 663 F. Supp. 833 (E.D. Mo. 1987) recognized this error.

This Court should grant the within Petition and correct the clear error of law committed by the Third Circuit. To allow the erroneous decision of the Third Circuit to stand will do grave harm to the statutory scheme adopted by Congress to restore confidence in the national banking system. The decision denies insurance depositors any meaningful opportunity to challenge the insurance determinations of the FSLIC.

B. The Decision of the Third Circuit Erroneously Limited Review Under the APA to the Arbitrary and Capricious Standard:

The Third Circuit decision held "final FSLIC decisions, while certainly reviewable by the District Court, must be reviewed under the 'arbitrary and capricious' standard of the APA." *York Bank & Trust Co.*, 851 F.2d at 641 (App. *infra.* at A-10) The Court by determining the standard of review under the APA usurped the function of the District Court and based its decision on a clearly inadequate record.

The Lower Court dismissed the Complaint filed by York Bank against the FSLIC after misconstruing it as a claim against the assets of Empire and against FSLIC as a receiver. The decision of the Third Circuit recognized this clear error and held that the Complaint filed against the FSLIC was for insurance proceeds. The District Court never reached the standard of review of an FSLIC determination and created no record from which the Third Circuit reached its decision.

The opinion of the Third Circuit correctly noted that this Court authorizes de novo hearings for an adjudicatory action limited to review under the APA if the agency's fact finding procedures are inadequate. *See Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). However, the Third Circuit decision ignored this statement of the law and held that the arbitrary and capricious review standard was applicable, without any determination as to the adequacy of the fact finding procedures utilized by the FSLIC.

York Bank was initially denied insurance except for $100,000 by letter dated May 4, 1984 from special counsel

to the FSLIC, David Taylor. Pursuant to regulations adopted by FSLIC, York Bank filed for reconsideration with the Federal Home Loan Bank Board. York Bank raised various arguments why it was entitled to insurance on the full amount of the certificates of deposit purchased at Empire. York Bank argued that the monies deposited at Empire were from trust accounts and pension accounts where no beneficial owner had more than a $100,000 interest. At the time of the filing for reconsideration York Bank did not know the reasons why they were being denied full insurance by the FSLIC.

On June 20, 1985, the FSLIC denied York Bank's request for reconsideration and affirmed the decision of Special Counsel David Taylor by letter dated June 20, 1985 by Mr. Neuberger, Deputy Director, FSLIC. The major reasons given by the FSLIC were the lack of information in the records of Empire that the monies deposited by York Bank were from trust and pension accounts.

Initially, Mr. Neuberger indicated that the phrase Yorst & Co. c/o York Bank does not necessarily establish an agency relationship since it could have different meanings. Mr. Neuberger also stated that the usual interpretation of "A c/o B" is that A has left material in B's care, B is the agent of A. However, the FSLIC requested no further evidence and engaged in no fact finding proceedings to resolve these ambiguities in the record.

Also, a letter from York to Empire disclosing the agency relationship and the type of accounts from which the monies deposited in Empire were drawn was not found in the records of Empire according to Mr. Neuberger. "Not only do the association records lack such a letter, but also the copy tendered by York Bank is not signed and is not supported by any records to establish that the original was

mailed, or any evidence to suggest that it was lost or destroyed by the Association. As to such evidence I cannot conclude that the letter is properly included in the association's account records. Consequently, it does not provide a basis for additional insurance coverage." Mr. Neuberger concludes that if the "letter is discovered in the association's records, it *could* form a basis for additional insurance only for Account No. 49-10106187". Mr. Neuberger and the FSLIC requested no evidence to support that this letter was sent by York and received by Empire. York Bank has such evidence and was, and continues to be, willing to present the same when it is given an opportunity at a hearing.[3] Furthermore, the procedures, if any, utilized by the FSLIC to determine whether this crucial letter was in the files of Empire do not appear in the record.

York Bank has never been given the opportunity to present evidence at a hearing on their right to full insurance in clear violation of the intent of the APA, 5 U.S.C. §552(a)(1) and (a)(2) as well as the decision in *Morton v. Ruiz,* 415 U.S. 199 (1974). The FSLIC did not provide York Bank fair adjudication of insurance claims consistent with traditional constitutional due process requirements and the APA. Consequently, to limit York Bank to a review of the decision denying it insurance under an arbitrary and capricious standard based on the record solely within the FSLIC's control, created by the FSLIC for its own purposes without meaningful opportunity to present evidence or contest the claims of the FSLIC would allow a major violation of the intent of Congress as expressed in

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[3]The individual who sent the letter dated November 28, 1983, is prepared to testify under oath that he mailed the letter. Furthermore, the letter requested financial information from Empire and such information was received from Empire in response to the letter.

12 U.S.C. §1728. "Where, as here . . . the intent of the parties with respect to ownership of the accounts may be crucial to an insurance determination, the procedures provided by the FSLIC appear even more inadequate." *Jugum v. FSLIC,* 637 F. Supp. at 1040.

The Court clearly could not find that the fact finding procedures utilized by the FSLIC were adequate based on the present state of the record. The Lower Court, after reviewing the procedures utilized by the agency, should determine in the first instance whether these procedures were adequate. *See Ramapo Bank v. Camp,* 425 F.2d 333 (3rd Cir. 1970), *cert. denied,* 400 U.S. 428 (1970). In the instant case there was no opportunity to present oral testimony or examine witnesses, no determination of the records reviewed by the FSLIC in making their determination or an opportunity to contradict any conclusions made by the agency. *See Fishback v. U.S,* 519 F. Supp. 190 (D. New Mex. 1980).

The Third Circuit erred in determining the fact finding procedures of the FSLIC were adequate without the opportunity to allow development of the record below. The District Court, in the first instance should determine the scope of review under the Administrative Procedure Act. Therefore, if this Court would find that the FSLIC's insurance determination can only be challenged pursuant to the provisions of APA, it should remand for a determination of the proper standard of review under the APA.

CONCLUSION

For the reasons previously set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MURPHY, TAYLOR & ADAMS, P.C.

By . . /S/ ARTHUR J. MURPHY, JR. . . .
Arthur J. Murphy, Jr.

By . . . . . /S/ PETER J. TAYLOR . . . . .
Peter J. Taylor

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United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5792

YORK BANK & TRUST COMPANY,
Appellant

vs.

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION in its corporate capacity and as receiver for EMPIRE SAVINGS & LOAN ASSOC. & THE FEDERAL HOME LOAN BANK BOARD FIRST UNITED FUND LIMITED, INC. & P.V. ANDERSON, INC.

Appeal from the United States District Court for the Middle District of Pennsylvania—Scranton (D.C. Civil No. 86-0376)

Argued
March 17, 1988
Before: STAPLETON, MANSMANN, and HUNTER,
Circuit Judges.

(Filed June 29, 1988)

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This appeal by York Bank and Trust Company raises issues concerning the nature of a claim against the Federal

Savings and Loan Insurance Corporation and the scope of judicial review available when the FSLIC is sued as an insurer. For the reasons discussed below we determine that the district court erred in construing York Bank's complaint against the FSLIC as a complaint against FSLIC as the receiver of a failed savings and loan institution. We conclude as well that judicial review of a determination by the FSLIC as insurer is subject to review by the district court under the standards enunciated in the Administrative Procedure Act. We will, therefore, remand for proceedings consistent with this opinion.

I.

In 1983, York Bank and Trust Company, a banking corporation chartered under the laws of Pennsylvania, purchased five certificates of deposit from the Empire Savings and Loan of Mesquite, Texas. The total face value of these "jumbo CDs" was $1,241,000.[1] Accounts at Empire were insured by the FSLIC.

On or about March 14, 1984 Empire was placed into receivership by the FSLIC. On March 15, 1984 York filed a claim with the FSLIC pursuant to 12 U.S.C. § 1724 for the recovery of the insurance on these certificates. This claim was denied by the FSLIC except for an aggregate total of $100,000. At that time York was also provided with claim certificates enabling it to receive a pro-rata share of

[1]The certificates of deposit purchased were as follows:

Account No.	*Face Amount*	*Date Purchased*	*Account Holder*
49-1010990	$104,000	10/05/83	Yorst & Co. c/o York Bank and Trust Co.
49-1012780	537,000	10/20/83	"
49-1016187	370,000	11/28/83	"
49-1016831	130,000	12/12/83	"
49-1018035	100,000	12/30/83	Yorst & Co.

Empire's assets, upon final distribution of those assets. On November 16, 1984, York filed for reconsideration of the FSLIC's determination, and that petition was denied as well.

Thereafter, on March 12, 1986 York Bank brought an action in the United States District Court for the Middle District of Pennsylvania, seeking the full amount of the CDs plus interest and attorney's fees. The complaint named the FSLIC, First United Fund Limited, Inc. and P.V. Anderson, Inc. as defendants.[2] The FSLIC then filed a Motion to Dismiss the federal defendants on the grounds that the district court had no subject matter jurisdiction in the case. The district court granted the motion and dismissed the case against the FSLIC. This appeal followed.

II.

We review the district court's dismissal of the complaint under a plenary standard of review. *D.P. Enterprises, Inc. v. Bucks County Community College,* 725 F.2d 943, 944 (3d Cir. 1984). We will first examine the existence *vel non* of subject matter jurisdiction over the federal defendants.

If York Bank's complaint is construed as an attempt to state a claim against the FSLIC and the Federal Home Loan Bank Board (FHLBB) as receiver of Empire Bank rather than as an insurer, then York's failure to exhaust its administrative remedies would result in a lack of subject

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[2]First United Fund and P.V. Anderson were the broker-dealers through whom York Bank purchased the CDs at issue. The claims against these parties were settled and do not form any portion of this appeal.

matter jurisdiction.[3] We observe, however, that before this court, York Bank has not wavered from its position that the suit against the FSLIC was in the FSLIC's capacity as insurer. We therefore conclude that the district court misconstrued the nature and intent of York Bank's complaint.

In its complaint[4] filed in the district court York specifically refers to Empire as an "insured institution" pursuant to National Housing Act, Subchapter IV. Insurance of Savings and Loan Accounts, 12 U.S.C. §§ 1724-1730a (1982 & Supp. IV 1986). York also specifically refers to its claim against the FSLIC as being the same claim for insurance

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[3]We note a conflict between the Courts of Appeals for the Fifth and Ninth Circuits on the issue of subject matter jurisdiction. In North Mississippi Sav. & Loan Ass'n. v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986), the court held that the sole remedy against the FSLIC consists of administrative procedures followed by judicial review under the APA. A panel of the Court of Appeals for the Ninth Circuit disagreed in Morrison-Knudsen Co., Inc. v. CHG Int'l., Inc., 811 F.2d 1209 (9th Cir. 1987), determining that, although in some cases exhaustion of administrative remedies may be prudent, failure to do so will not deprive a district court of jurisdiction. We also note that a subsequent panel of the Ninth Circuit has implicitly overruled *Morrison-Knudsen. See* Fidelity Financial Corp. v. FSLIC, 834 F.2d 741 (9th Cir. 1987). Finally we note that ten days before this court heard argument in this case, the Supreme Court granted certiorari in Coit Independence Joint Venture v. Firstsouth F.A., 829 F.2d 563 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1105 (1988). In *Coit* the court followed *Hudspeth* and rejected *Morrison-Knudsen* on the issue of FSLIC's exclusive jurisdiction.

[4]The relevant paragraphs of the complaint read as follows:

> 17. Empire was at all times herein mentioned, an "insured institution" as provided in 12 U.S.C. §§ 1724-1730a.
>
> * **
>
> 19. On March 15, 1984, York Bank filed a claim with FSLIC for the recovery of the aforesaid deposits. FSLIC failed and refused to pay the amount due and owing. The FSLIC still fails and refuses to pay such claim except for $100,000.00, which was paid without prejudice to the position of either of the parties.

proceeds that York had previously pressed before that agency. We note as well that the communications between York Bank, the FSLIC and the FHLBB prior to the commencement of suit all refer to the underlying problem as involving the insurance of York's deposits at Empire Bank. In addition, the pleadings do not allege an attempt to reach the assets of Empire either through a claim in receivership or by any other means.

The district court essentially assumed that York sued the FSLIC solely as receiver of Empire Bank's assets and not as the insurer of the certificate of deposit. The court founded this assumption on assertions in York Bank's brief, filed in the district court, opposing the federal defendant's Motion to Dismiss. This district court brief, although alluded to in appellant's brief, was not among the papers presented to this court. Even if it were, we consider the allegations and averments of the complaint more fundamentally important in that the complaint alerts and informs the defendant as to the *nature* of the claims being asserted. In this case, FSLIC understood from the complaint that it was being sued for insurance proceeds. Responding to the complaint, FSLIC admitted that a claim for insurance proceeds had been presented to it, and FSLIC tendered to the court for review the administrative record pertaining to that claim.

In this case, we find that the complaint stated with sufficient precision that York Bank sued the FSLIC in its corporate capacity as insurer of funds deposited with Empire Bank. Therefore, the district court erred in its determination that the FSLIC was being sued in its receivership capacity and we will remand for proceedings consistent with this opinion.

III.

Given our determination that York Bank stated a claim against the FSLIC as insurer and our remand for a determination on the merits, we next assess the standard of review under which the distdrict court will evaluate the claim.

The FSLIC, as an agency of the United States, adjudicates claims through an administrative procedure pursuant to regulations promulgated by the FHLBB. *Lyons Savings & Loan Assoc. v. Westside Bancorporation, Inc.,* 828 F.2d 387, 390 (7th Cir. 1987). The FSLIC insists that its decisions on the claims are subject to review in a district court under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. IV 1986), utilizing the arbitrary and capricious standard of review, 5 U.S.C. § 706(2). The FSLIC asserts that, absent a congressional directive to conduct *de novo* review, consideration must be confined to the administrative record.

To support its position the FSLIC cites *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971). In that case the Supreme Court found that when a district court reviews federal agency action subject to the provisions of the APA, the arbitrary and capricious standard applies. When agency action is taken pursuant to a rule-making provision of the APA or when agency action is based on a public adjudicatory hearing, the reviewing court utilizes the substantial evidence test. *De novo* review is authorized for review of an adjudicatory action in which the agency fact-finding procedures are inadequate.

York Bank relies principally on *Jugum v. FSLIC*, 637 F. Supp. 1045 (W.D. Wa. 1986),[5] which upheld the right of a depositor to enforce a claim against the FSLIC but did not limit that right to review under the provisions of the APA. The court in *Jugum* noted that under 12 U.S.C. § 1725(c)(4), the FSLIC has the authority to sue or be sued in any court of competent jurisdiction. *Id.* at 1047. Under 12 U.S.C. § 1728(b), the FSLIC must pay insurance on insured accounts, but it may require the judicial determination of liability before paying claims. Moreover, 12 U.S.C. § 1728(c) provides a statute of limitations for actions against FSLIC as insurer. *Id.* The district court evaluated these provisions and determined that it had the authority to decide such actions on the merits. The district court also reasoned that no statutory provision required the exhaustion of administrative remedies prior to judicial action and that the statute of limitations provision in § 1728(c) implied that administrative action need not be taken. *Id.* The court in *Jugum* concluded by noting that limitations on administrative procedures available to FSLIC claimants "suggest that Congress intended that those claimants would have access to an independent judicial determination of their entitlement to insurance." *Id.* at 1048.

Although the court in *Jugum* relied heavily on the provisions of 12 U.S.C. § 1728(b) and (c) to support its position that an aggrieved depositor was not limited to judicial review under the APA, we find no language in those provisions which authorizes review under a different standard.

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[5]The district court's opinion was vacated as moot, Jugum v. FSLIC, No. 87-3517 (9th Cir. July 21, 1987), *reprinted in* Appellant's Reply Brief, Exhibit A.

We begin our own analysis with the regulations promulgated by the FHLBB, Amendment of Part 563 - Settlement of Insurance, 50 Fed. Reg. 49,527 (1985) (codified at 12 C.F.R. § 564.1). In general 12 C.F.R. § 564.1 (1988) provides for the payment of insurance to accountholders of insured institutions. If the Director of the Insurance Division determines that all or a portion of an account is not insured, the Director shall notify the accountholder and provide the accountholder with a certificate of claim in liquidation to enable the accountholder to share in the proceeds, if any, of liquidation. *Id.* at § 564.1(d)(2). The accountholder may request reconsideration of the initial determination, *id.* at § 564.1(d)(3), and the FSLIC must either grant or deny the request within 60 days, *id.* at § 564.1(d)(3)(iii)(c). The Director must issue a decision regarding the accountholder's claim for insurance within 180 days thereafter. *Id.* at § 564.1(d)(4). An accountholder's failure to request reconsideration constitutes a failure to exhaust administrative remedies and all objections to the initial determination are deemed to be waived. *Id.* at § 564.1(d)(5)(b)(iii).

Section 564.1(d)(5) permits judicial review of final agency actions taken under Section 564.1(d)(4). Thus the regulations provide for judicial review, anticipated as a necessary part of the FSLIC legislative scheme.

We find, however, that the judicial review envisioned by this insurance and banking legislation is subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551-559 (1982 & Supp. IV 1986). Chapter Seven of the Act codifies and defines not only what agency decisions are judicially reviewable, but what the standard of review should be. 5 U.S.C. §§ 701-706 (1982 & Supp. IV 1986).

We begin by noting that the Act applies to agency actions except to the extent that—

> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).[6]

Specifically, agency actions subject to judicial review are either those made reviewable by statute or those final agency actions for which no other adequate remedy remains in a court. On the review of a final agency action, preliminary, procedural or intermediate agency rulings that are not directly reviewable are subject to review. 5 U.S.C. § 704. Finally, the APA provides that a reviewing court shall decide all relevant questions of law and shall

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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[6]By definition, an "agency" is an authority of government, but does not include:

"(b) For the purpose of this chapter—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and . . . ."

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . .

5 U.S.C. § 706.

We conclude, therefore, that final FSLIC decisions, while certainly reviewable by the district court, must be reviewed under the "arbitrary and capricious" standard of the APA. We find support for this position in the recent case of *Baskes v. Federal Sav. and Loan Ins. Corp.*, 649 F. Supp. 1358 (N.D. Ill. 1986). *Baskes* also involved insurance claims on funds deposited at Empire Savings and Loan of Mesquite, Texas.

In *Baskes,* a depositor who believed he had not received full insurance payments to which he was entitled from the FSLIC filed a complaint in district court seeking, *inter alia,* judicial review of the insurance determination. The district court stated:

> The standard of review for analyzing the final determination of the FSLIC is established by the APA. 5 U.S.C. § 706. When reviewing administrative decisions, courts are authorized to set aside agency decisions only when they are: (1) unconstitutional, (2) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, (3) not authorized by statute, (4) violative of established procedure, or (5) unsupported by substantial evidence. In the present case, [the plaintiff] asserts the decision of the FSLIC refusing trust account coverage on the two insurance claims as trustee was arbitrary and capricious.
>
> ****
>
> Finally, a court reviewing an administrative decision is not permitted to hold a *de novo* hearing, but must restrict its inquiry to evidence contained in the

administrative record. *Atlantic Refining Co. v. FTC,* 381 U.S. 357, 367 (1965).

Baskes, 649 F. Supp. 1361-62.

We note as well the Fifth Circuit's adherence to the proposition that "the FSLIC's determination on insurance must be challenged by seeking review pursuant to the Administrative Procedure Act." *Godwin v. Fed. Sav. and Loan Ins. Corp.,* 806 F.2d 1290, 1292 (5th Cir. 1987).

We find that determinations made by the FSLIC in regard to insurance of depositors' accounts are judicially reviewable under the provisions of the Administrative Procedure Act.

Therefore, we will remand this case for proceedings consistent with this opinion.

STAPLETON, *Circuit Judge,* Concurring and Dissenting:

I agree with my colleagues that York Bank's complaint states a claim for insurance proceeds and that, accordingly, this case should be remanded to the district court for further proceedings. I write separately because I believe the district court should conduct a *de novo* proceeding as it would in any other suit to recover insurance proceeds.

As the court's opinion appears to acknowledge, the APA's provisions for judicial review of agency actions are not intended to preempt adequate judicial remedies created by Congress in other federal legislation. 5 U.S.C. § 704 (1982); *see, e.g., Alabama Rural Fire Ins. Co. v. Naylor,* 530 F.2d 1221, 1230 (5th Cir. 1976) ("Section 704 of the

APA provides that judicial review is inappropriate where there exists some other adequate remedy in a court, and the availability of a remedy in the Court of Claims under the Tucker Act has been held to be an adequate remedy."). Because Congress clearly intended that persons having deposits in insured savings and loan institutions would be able to institute plenary suits against the FSLIC in a federal district court to collect insurance proceeds, the APA does not deprive York Bank of its right to a *de novo* determination of the factual and legal issues raised by its complaint. *See Newsom v. Vanderbilt Univ.,* 653 F.2d 1100, 1108 (6th Cir. 1981) (stating that "the Administrative Procedure Act does not prevent the court from engaging in a *de novo* review where the language of the statute or the legislative history authorize[s] a trial *de novo*").

In the FSLIC Act, Congress, after establishing the FSLIC as a public corporation, decreed that "[i]t shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations . . . ." 12 U.S.C. § 1726(a) (1982). Upon approval of an application from a savings and loan, the FSLIC is directed to issue a certificate of insurance, *id.* § 1726(c), which in effect creates an agreeent between the FSLIC and the applicant. Depositors are the third party beneficiaries of these agreements of insurance when a savings and loan association defaults. *See id.* § 1728(a), (b). The "FSLIC is [thus] in the insurance business" and, even in the absence of express Congressional stipulation, it may be "assumed to have accepted the ordinary incidents of suits in such business." *North N.Y. Sav. Bank v. FSLIC,* 515 F.2d 1355, 1364 (D.C. Cir. 1975) (footnote omitted). Express Congressional stipulations do exist, however.

When one examines the Act, one finds what one would expect to find in the context of a corporation issuing insurance: (1) "[i]n the event of a default by any insured institution, payment of each insured account . . . shall be made by the Corporation as soon as possible . . . "; (2) "the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts"; and (3) "where the Corporation is not satisfied as to the validity of a claim for an insured account," it may, in its discretion, reject a claim and "require the final determination [of the claim by] a court of competent jurisdiction." 12 U.S.C. § 1728(b) (1982).

In implementation of these provisions the FSLIC is authorized to "sue and be sued . . . in any court of competent jurisdiction," *id.* § 1725(c)(4). Further, "any civil action, suit, or proceeding to which the Corporation shall be a party [is] deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy." *Id.* § 1730(k)(1)(B). Monetary judgments against the FSLIC can be entered by the district courts, but there can be "[n]o attachment or execution . . . against the Corporation or its property before final judgment." *Id.* § 1730(k)(1).

If any doubt remains concerning the intent of Congress after reviewing these statutory provisions, it is dispelled by the following section of the statute:

> (c) No action against the Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three year period, . . . the claim for payment of insurance shall have been

> presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial."

Id. § 1728(c).

It is hard to imagine how Congress could state more clearly that a plenary civil action may be brought by a depositor against the FSLIC for insurance proceeds within three years of the default and that this is permissible whether or not a claim has been presented to the FSLIC and rejected by it. The opinion of the court does not, and cannot, attribute any other meaning to these words. As the Court of Appeals for the Ninth Circuit has recently observed with respect to this section, "[t]he language used indicates unambiguously that Congress anticipated judicial adjudication in the event of a disputed claim. . . ." *Morrison-Knudsen Co. v. CGH Int'l. Inc.*, 811 F.2d 1209, 1220 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, No. 87-451, 56 U.S.L.W. 3249 (Sept. 17, 1987).

Other provisions of the Act and related legislation also indicate that Congress expected judicial, rather than agency resolution of insurance agreement disputes and that, as in other suits on an insurance policy, the insurer's reasons for denying a claim to the proceeds plays no crucial role in the adjudication. I do not chronicle those other provisions here because they have been thoroughly reviewed in *Herbert v. National Credit Union Admin. Bd.*, 663 F. Supp. 833 (E.D. Mo. 1987) and *Jugum v. FSLIC*, 637 F. Supp. 1045 (W.D. Wash. 1986).

In my view, the statute leaves us with no alternative but to remand for a *de novo* determination of the facts and

the law, with appropriate deference being accorded the FSLIC's interpretation of its own regulations.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5792

YORK BANK & TRUST COMPANY,
Appellant

vs.

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION in its corporate capacity and as receiver for EMPIRE SAVINGS & LOAN ASSOC. & THE FEDERAL HOME LOAN BANK BOARD FIRST UNITED FUND LIMITED, INC. & P.V. ANDERSON, INC.

Appeal from the United States District Court for the Middle District of Pennsylvania—Scranton (D.C. Civil No. 86-0376)

Before: STAPLETON, MANSMANN, and HUNTER,
Circuit Judges.

ORDER AMENDING SLIP OPINION

It is ORDERED that the slip opinion in the above captioned case, filed June 29, 1988, be amended as follows:

The last paragraph on page 13 should be replaced with the following paragraph:

The judgment of the district court is vacated and the cause remanded for proceedings consistent with this opinion.

BY THE COURT

/s/ CAROL LOS MANSMANN
Circuit Judge

Dated: July 1, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5792

YORK BANK & TRUST COMPANY,
Appellant

vs.

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION in its corporate capacity and as receiver for EMPIRE SAVINGS & LOAN ASSOC. & THE FEDERAL HOME LOAN BANK BOARD FIRST UNITED FUND LIMITED, INC. & P.V. ANDERSON, INC.

Appeal from the United States District Court for the Middle District of Pennsylvania—Scranton (D.C. Civil No. 86-0376)

Before: STAPLETON, MANSMANN, and HUNTER, *Circuit Judges.*

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above captioned case, filed June 29, 1988, be amended as follows:

1. The last paragraph on page 12 should be replaced with the following paragraph:

The judgment of the district court is vacated and the cause remanded for processing consistent with this opinion.

2. In line 1 of the first paragraph under section I on page 3, the comma after 1983 is deleted.

3. In line 4 of the first paragraph under section I on page 3, the word "the" before Empire is deleted.

4. In line 9 of the second paragraph under section I on page 3, the comma after 1984 is deleted.

5. In footnote 1 on page 3, the last "d" in the word "Dated" is deleted.

6. In footnote 3 on page 4, the comma following the word "Inc." and preceding "v" is deleted.

7. In line 1 on page 7 the word "Savings" is deleted and replaced by "Sav."

8. In line 2 of the last paragraph on page 7, the footnote number 5 is deleted.

9. On page 7 footnote 5 is deleted.

10. On page 9 the numbers in the text and in the footnote are changed from 6 to 5.

11. In line 3 on page 11, the world "the" is inserted between the words "in" and "district."

BY THE COURT

/s/ CAROL LOS MANSMANN

Circuit Judge

Dated: July 1, 1988

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5792

YORK BANK & TRUST COMPANY,
Appellant

vs.

FEDERAL SAVINGS & LOAN INSURANCE CORP., ET AL.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker and Judge Stapleton would grant rehearing.

Judge Hutchinson dissents from the denial of rehearing and would remand the case to the district court to conduct a *de novo* proceeding for the reasons set forth in Judge Stapleton's concurring and dissenting opinion.

BY THE COURT

/s/ CAROL LOS MANSMANN
Circuit Judge

Dated: August 1, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THE YORK BANK & TRUST COMPANY, *Plaintiff* vs. FEDERAL SAVINGS & LOAN INSURANCE CORPORATION in its corporate capacity and as receiver for EMPIRE SAVINGS & LOAN ASSN., FEDERAL HOME LOAN BANK BOARD, FIRST UNITED FUND LIMITED, INC., and P.V. ANDERSON, *Defendants*	CIVIL ACTION NO. 86-0376

MEMORANDUM

Introduction

Plaintiff, The York Bank & Trust Company, brought this action against the federal defendants, the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Company ("FSLIC"), contesting a determination made by the FSLIC that certain certificates of deposit owned by plaintiff whose face value exceeds one million dollars were only insured to the extent of $100,000.00.[1] The federal defendants have moved to

[1]Plaintiff has also sued defendants, First United Fund Limited, Inc., and P.V. Anderson, Inc., alleging that it was induced by fraud and misrepresentation to purchase the certificates of deposit.

dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. It is the position of defendants that plaintiff is limited to the exclusive remedies provided under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, and that we lack jurisdiction to entertain plaintiff's claims against them. For the reasons set forth below, we will grant defendants' motion.

Background

On March 14, 1984, the FHLBB appointed the FSLIC as a receiver for Empire Savings and Loan Association. Prior to being placed in receivership, Empire had sold five certificates of deposit to plaintiff. The total face value of the certificates was in excess of one million dollars. Employing its receivership powers, the FSLIC determined that plaintiff's certificates were only insured to the statutory maximum of $100,000. Plaintiff requested a reconsideration of the FSLIC's determination and that request was formally denied on June 20, 1985. Thereafter, the plaintiff initiated this action against the FSLIC as a receiver for Empire, to recover monies that were deposited with Empire and insured by the FSLIC.

Discussion

The federal defendants argue that plaintiff's claims against them must be dismissed for lack of subject matter jurisdiction. They contend that jurisdiction over plaintiff's claims is exclusively vested in the FSLIC and FHLBB and that judicial interference with this administrative process is specifically prohibited by statute.[2] In support of this

[2]Defendants also argue plaintiff's action is barred by the doctrine of sovereign immunity. This argument, however, is clearly without merit

(Continued on next page)

argument, defendants cite 12 U.S.C. § 1464(d)(6)(C) which provides:

> (C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect that exercise of powers or functions of a conservator or receiver.

Defendants further rely on the decision of the Fifth Circuit Court of Appeals in *North Mississippi Savings & Loan Association v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985) to advance their position. In *Hudspeth,* the court held that jurisdiction over defendant's counterclaim against the FSLIC was exclusively with the FHLBB and upheld the dismissal of defendant's counterclaim. The court found that the adjudication of creditors' claims was the exclusive function of the FSLIC and that judicial review would restrain the FSLIC in the exercise of its receivership powers. It also found that the existence of such power was supported by the statutory scheme and consistent with the overriding purpose of Congress of facilitating the expeditious review of creditor's claims. As the the court stated:

> Our conclusion is fortified by the existence of FHLBB regulations setting forth procedures for FSLIC payment of creditor claims. Under these regulations, the FSLIC gives notice to creditors to present their

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(Continued)

as 12 U.S.C. § 1725(c)(4) specifically provides that the FSLIC has the power to "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States . . . ." *See Morrison-Knudsen Co. Inc. v. G. H. G. International, Inc.,* 811 F.2d 1209 (9th Cir. 1987); *Jugum v. Federal Savings and Loan Insurance Corp.,* 637 F. Supp. 1045 (W.D. Wash. 1986).

> claims, and then may disallow claims "not proven to its satisfaction." Any disallowed claims are submitted to the FHLBB for review. 12 C.F.R. §§ 569a.8, 549.4. This administrative process serves to hasten the resolution of the receivership proceedings, in keeping with the Congressional purpose. Furthermore, the regulations reflect the view of the FHLBB, the enforcing agency for the relevant banking statutes, that the FSLIC is empowered to decide claims as part of its receivership function. The FHLBB's opinion is entitled to our deference. *Mattox v. FTC,* 752 F.2d 116, 123-24 (5th Cir. 1985); *Chevron U.S.A. v. Natural Resources Defense Council,* U.S. , 104 S. Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).

Id. at 1102-03 (footnote omitted).

Plaintiff, on the other hand, argues that *Hudspeth* should be rejected in favor of the Ninth Circuit's recent decision in *Morrison-Knudsen Co., Inc. v. CHG International,* 811 F.2d 1209 (9th Cir. 1987).[3] There, the court held that jurisdiction over plaintiff's claims against the FSLIC was not vested exclusively with the FHLBB and permitted plaintiff to pursue its claims in federal district court. In contrast to the *Hudspeth* court, it found that the FSLIC's receivership powers did not include the authority to adjudicate creditor's claims as there was no evidence in the relevant statutory language or legislative history that the FSLIC, as a receiver, was empowered to adjudicate creditor's claims. In addition to these considerations, the court relied on such factors as the failure of Congress to provide detailed measures delineating agency procedures and remedies and the broad grant of jurisdiction to the federal courts over any action in which the FSLIC is a

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[3]A motion for rehearing *en banc* is currently pending before the Ninth Circuit.

party. *See* 12 U.S.C. § 1730(k)(l). The court also noted the Federal Deposit Insurance Corporation, which has similar receivership powers, has never asserted that it was authorized to adjudicate the claims of creditors. The court summarized its position in the following manner:

> To sum up, we conclude that FSLIC's assertion of adjudicatory power in its receivership capacity is unsupported by the statutory language and inconsistent with congressional intent. The two-tiered framework Congress has established for FSLIC (as for the FDIC) is clear and coherent. As overseer of ongoing associations, the agency stands above the insured institutions and has important but well-defined adjudicatory powers to ensure compliance with federal law. As receiver for failed associations, however, FSLIC stands in the shoes of the insured institution. It takes over assets and liabilities, and it assumes full operational control in its own name. It is empowered and indeed obligated to pay all valid depositors' and creditors' claims up to certain limits in orderly fashion and without immediate judicial supervision. It may settle or release these claims with the consent of claimant parties as it sees fit in order to accomplish this task more efficiently. But when a claim is disputed and agreement cannot be reached, FSLIC is obliged to attend court just as the institutions it represents would have had to do.

Id. at 1222.

Faced with these opposing views, we find the position taken by the court in *Hudspeth* to be more persuasive. As the foregoing discussion of these cases indicates, the critical issue is whether the FSLIC, as a receiver, is empowered

to adjudicate the claims of creditors and depositors.[4] This issue is important because if the FSLIC is so empowered, then judicial review of its determinations would constitute an impermissible restraint of its receivership powers specifically prohibited by 12 U.S.C. § 1464 (d)(6)(c).

Unlike the *Morrison-Knudsen* Court, we conclude that the FSLIC, as a receiver, is vested with the power to adjudicate the claims of creditors and depositors. Authority for this conclusion is found in § 1729(d) which provides:

> In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . . .

12 U.S.C. § 1729(d).[5]

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[4]Plaintiff has indicated in the its brief that it is only suing the FSLIC in its capacity as a receiver (plaintiff's brief at p. 5) and therefore we need not consider whether we have jurisdiction to entertain a claim for payment of insurance made against the FSLIC in its corporate capacity. *See Baskes v. Federal Savings and Loan Association,* 649 F. Supp. 1358 (N.D. Ill. 1986); *Jugum v. Federal Savings and Loan Insurance Corp.,* 637 F. Supp. 1045 (W.D. Wash. 1986).

[5]Section 12 U.S.C. § 1729(d) has subsequently been amended to provide

> In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been

(Continued on next page)

In addition, the FHLBB in the exercise of its rulemaking authority under 12 U.S.C. § 1464(d)(11) has established an administrative procedure for adjudicating claims against the assets of a savings and loan in receivership. Under these rules, the FSLIC is authorized to "allow any claim seasonably received and proved to its satisfaction" and may "wholly or partly disallow any creditor claim or claim for security, preference, or priority not so proved and shall notify the claimant of the disallowance and the reason therefor." 12 C.F.R. § 549.4(b). The determination of FSLIC is subject to review by the FHLBB, § 549.4(b), 549.5-1(b)(2) and the claimant may seek judicial review of the FHMBB's final decision in federal court under the Administrative Procedures Act, 5 U.S.C. § 701-706. *See Lyons Savings and Loan Association v. Westside Bancorporation, Inc.*, No. 86-1793 (7th Cir. June 5, 1987). Thus, by exercising its rulemaking power in this manner, the FHLBB has clearly interpreted the powers of the FSLIC to include the authority to adjudicate the claims of creditors and depositors and this interpretation is entitled to deference. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 68 L.Ed.2d 744, 101 S. Ct. 2239 (1981).

The legislative history of § 1464(d)(6)(C) also appears to support the position taken by defendants. The Senate Banking and Currency Committee stated that the effect of § 1464(d)(6)(C) would be to

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(Continued)

> appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

This amendment, however, is not applicable to this action as plaintiff's complaint was filed when the previous enactment was still in force. *See Lyons Savings and Loan Association v. Westside Bancorporation, Inc.*, No. 86-1793 (7th Cir. June 5, 1987) slip op. at 5 n.2.

> limit the jurisdiction of a court to order the removal of a conservator or receiver, except in an action for removal brought by an association under authority of paragraph (6)(A) of the proposed amended section 5(d), or, except at the instance of the Board, to restrain the exercise of the powers or functions of a conservator or receiver.

S.Rep. No. 1482, 89th Cong., 2d Sess. 14, *reprinted in* 1966 U.S. Code Cong. & Ad.News 3532, 3546.

The House Committee on Banking and Currency also reported:

> The scope of judicial review shall also be in the conformity with the provisions of Title 5 of the United States Code relating to judicial review of administrative action, . . . except that agency action, findings, and conclusions may be set aside if not supported by the weight of the evidence . . . The purpose of the new language is to safeguard the right of individuals and institutions from arbitrary and capricious agency action.

Lyons Savings and Loan Association v. Westside Bancorporation, Inc., 636 F. Supp. 576, 580 (N.D. Ill. 1986) (quoting H.Rep. No. 2077, 89th Cong., 2d Sess. 6 (1966)).

These comments indicate to us that congress intended only for administrative, rather than judicial, review of FSLIC determinations.

Finally, we note that the overwhelming majority of courts have followed the *Hudspeth* approach. *See e.g., Lyons Savings and Loan Association v. Westside Bancorporation, Inc.*, No. 86-1793 (7th Cir. June 5, 1987); *Federal Savings and Loan Insurance Corporation v. Oldenburg*, No. 85-C-1418W (D. Utah April 7, 1987) (Lexis); *Federal*

Savings and Loan Insurance Corporation v. Quality Inns, Inc., 650 F. Supp. 918 (D. Md. 1987); *Sunrise Savings and Loan Association v. LIR Development Co.*, 641 F. Supp. 744 (S.D. Fla. 1986). Based upon these considerations, we conclude that any claim arising from the exercise of the FSLIC's power as a receiver must be channeled through the administrative process and accordingly defendants' motion to dismiss will be granted.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

Dated: July 10, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THE YORK BANK & TRUST COMPANY, *Plaintiff* vs. FEDERAL SAVINGS & LOAN INSURANCE CORPORATION in its corporate capacity and as receiver for EMPIRE SAVINGS & LOAN ASSN., FEDERAL HOME LOAN BANK BOARD, FIRST UNITED FUND LIMITED, INC., and P.V. ANDERSON, *Defendants*	**CIVIL ACTION NO. 86-0376**

ORDER

AND NOW, this 10th day of July, 1987, it is ordered that defendants' motion to dismiss for lack of subject matter jurisdiction is granted and the federal defendants are hereby dismissed as party defendants.

/s/ WILLIAM W. CALDWELL
William W. Caldwell
United States District Judge

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1724 provides:

(a) The term "insured institution" means an institution whose accounts are insured under this title.

(b) The term "insured member" means an individual, partnership, association, or corporation which holds an insured account. Each officer, employee, or agent of the United States, of any state of the United States, of the District of Columbia, of any Territory of the United States, of Puerto Rico, of the Virgin Islands, of any county, of any municipality, or of any political subdivision thereof, herein called "public unit", having official custody of public funds and lawfully investing the same in an insured institution shall, for the purpose of determining the amount of the insured account, be deemed an insured member in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully investing the same in the same insured institution in custodial capacity. Except in the case of an insured member referred to in the preceeding sentence, funds held in fiduciary capacity, when invested in an insured institution, shall be insured in an amount not to exceed $100,000 for each such trust estate, and notwithstanding any other provisions of this Act, such insurance shall be separate from and additional to that covering other investments by the owners of such trust funds of the beneficiaries of such trust estates. Notwithstanding any other provision of law, two persons who are husband and wife shall have, with respect to accounts in an insured institution which are community property of such husband and wife and to the extent that such accounts are community property, not to exceed $100,000 of insurance with respect to such an

account or accounts in the sole name of the husband, not to exceed $100,000 of insurance with respect to such account or accounts in the sole name of the wife, and not to exceed $100,000 of insurance with respect to such an account or accounts in the sole name of both: Provided, That in no event shall this sentence increase to an amount which is greater than the total of the amounts hereinbefore set forth in this sentence the aggregate of the insurance which such husband and wife may have under this title with respect to (1) any account or accounts in such institution in the sole name of either of them, or in the sole names of both, and (2) any other account or accounts in such institution to the extent that such other account or accounts would, in the absence of this sentence, be required to be included in determining the amount of the individual insurance of such husband or of such wife under subsection (a) of Section 1728 of this title.

(c) The term "insured account" means a share, certificate, or deposit account of a type approved by the Federal Savings and Loan Insurance Corporation which is held by an insured member in an insured institution and which is insured under the provisions of this title.

(d) The term "default" means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of litigation.

12 U.S.C. § 1725(c) provides:

(c) Powers. On June 27, 1934, the Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

(1) To adopt and use a corporate seal.

(2) To have succession until dissolved by Act of Congress.

(3) To make contracts.

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

(5) To appoint and to fix the compensation, by its board of trustees, of such officers, employees, attorneys, or agents, as shall be necessary for the performance of its duties under this title. Nothing in this title or any other provisions of law shall be construed to prevent the appointment and compensation as an officer, attorney, or employee of the Corporation, of any officer, attorney, or employee of any board, corporation, commission, establishment, executive department, or instrumentality of the Government. The Corporation, with the consent of any board, corporation, commission, establishment, executive department, or instrumentality of the Government, including any field service thereof, may avail itself of the use of information, services, and facilities thereof in carrying out the provisions of this title. The Corporation shall be entitled to the free use of the United States mails for its official business and shall determine its necessary expenditures under this Act and the manner in which the same shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditures of public funds. All necessary expenses in connection with the making of supervisory or other examinations (except examinations of

Federal home loan banks), including the provision of services and facilities therefore, shall be considered as nonadministrative expenses.

12 U.S.C. § 1728 provides:

(a) Amount of insurance. Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawal or repurchasable value of the accounts of each of its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor (other than a member or investor referred to in subsection (d)) of any such institution shall be insured for an aggregate amount in excess of $100,000. Whenever the liabilities of an insured institution for accounts shall have been assumed by another insured institution or institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, all accounts so assumed shall have separate insurance which shall terminate at the end of six months from the date such assumption takes effect or, in the case of any certificate account, the earliest maturity date after the six-month period. For the purpose of clarifying and defining the insurance coverage under this subsection, subsection (d) of this section, and subsection (b) of section 1724 of this title, the Corporation is authorized to define, with such classifications and exceptions as it may prescribe, terms used in those subsections and in subsection (c) of section 1724 of this title and the extent of the insurance coverage resulting therefrom.

(b) Default of insured institutions. In the event of a default by any insured institution, payment of each

insured account in such insured institution which is surrendered and transferred to the Corporation shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member: Provided, That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

(c) Statute of limitations. No action against the Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial.

(d) Insurance and investment of public funds. (1) Notwithstanding any limitation in this title or in any other provision of law relating to the amount of deposit insurance available for any one account, in the case of an insured member who is—

(i) an officer, employee or agent of the United States having official custody of public funds and lawfully investing the same in an insured institution;

(ii) an officer, employee or agent of any State of the United States, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing the same in an insured institution in such State;

(iii) an officer, employee, or agent of the District of Columbia having official custody of public funds and lawfully investing the same in an insured institution in the District of Columbia;

(iv) an officer, employee, or agent of the Commonwealth of Puerto Rico, or of the Virgin Islands, or of any territory or possession of the United States, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing the same in an insured institution in the Commonwealth of Puerto Rico, in the Virgin Islands, or any such territory or possession, respectively; or

(v) an officer, employee, or agent of an Indian tribe (as defined in section 1452(c) of title 25) or agency thereof having official custody of tribal funds and lawfully investing the same in an insured institution;

the account of such insured member shall be insured in an amount not to exceed $100,000 per account.

(2) The Corporation may limit the aggregate amount of funds that may be invested in any insured institution by any insured member referred to in paragraph (1) of this subsection on the basis of size of any such institution in terms of its assets.

(3) Notwithstanding any limitation in this title or in any other provision of law relating to the amount of deposit insurance available for any one account, funds invested in an insured institution pursuant to a pension or

profit-sharing plan described in section 401(d) of title 26, and funds invested in an insured institution in the form of individual retirement accounts as described in section 408(a) of title 26, shall be insured in the amount of $100,000 per account. As to any plan qualifying under section 401(d) or section 408(a) of title 26, the term "per account" means the present vested and ascertainable interest of each beneficiary under the plan, excluding any remainder interest created by, or as a result of, the plan.

Supreme Court, U.S.
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CLERK

No. 88-617

In the Supreme Court of the United States

OCTOBER TERM, 1988

YORK BANK & TRUST COMPANY, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, when a federally insured savings and loan institution defaults, the Federal Savings and Loan Insurance Corporation is authorized to make federal insurance coverage determinations in the first instance, subject to judicial review under the Administrative Procedure Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 851 F.2d 637. The opinion of the district court (Pet. App. A22-A30) is reported at 663 F. Supp. 1100.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1988. A petition for rehearing was denied on August 1, 1988 (Pet. App. A20-A21). The petition for a writ of certiorari was filed on October 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Savings and Loan Insurance Corporation (FSLIC) is a corporate governmental agency responsible, purusant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring depositors' accounts at all federally-chartered savings and loan associations and most state-chartered savings and loan associations. This case arises from the FSLIC's determination to deny petitioner's claim for federal insurance in excess of $100,000 on certificates of deposit (CDs) issued by a failed savings and loan association.

1. Congress has instructed the FSLIC to insure deposit accounts of qualifying savings and loan institutions "except that no member or investor * * * of any such institution shall be insured for an aggregate amount in excess of $100,000" (12 U.S.C. 1728(a)). It also has expressly authorized the FSLIC to promulgate regulations defining various statutory terms and creating classifications and exceptions for determining the extent of insurance coverage (12 U.S.C. 1728(a)). In addition, Congress has directed the FSLIC, in its corporate capacity as insurer of deposit accounts, to pay insured depositors "as soon as possible" after an institution's default (12 U.S.C. 1728(b)). The FSLIC typically does so within days.[1]

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[1] The Federal Home Loan Bank Board (Bank Board), an independent agency in the Executive Branch organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. VI) 1421 *et seq.*, serves as the operating head of the FSLIC. Congress has given the Bank Board broad discretionary powers over the operation of the savings and loan industry, including the power to appoint the FSLIC as conservator or receiver for a federally-insured savings and loan association, ex parte and without prior court approval, if the Bank Board determines that statutory grounds exist (12 U.S.C. 1464(d)(6), 1729(c)(1)(B)). In addition to providing insurance, the FSLIC thus performs various administrative functions with respect to failed institutions in its separate capacity as a receiver.

The FSLIC's insurance regulations, which are codified at 12 C.F.R. Pt. 564, also establish procedures for the administrative resolution of insurance coverage disputes. If the Director of the FSLIC's Insurance Division determines that all or portions of an account are not insured, he must notify the accountholder and provide the accountholder with a certificate of claim in liquidation that entitles the accountholder to a pro rata share of the receivership assets (12 C.F.R. 564.1(d)(2)). The accountholder may request reconsideration of the initial determination (12 C.F.R. 564.1(d)(3)(i)), and the Director of the FSLIC must either grant or deny the request for reconsideration within 60 days (12 C.F.R. 564.1(d)(3)(iii)(c)). If the request is granted, the Director must issue a final written decision on the accountholder's claim within 180 days (12 C.F.R. 564.1(d)(4)). Finally, Section 564.1(d)(5) of the regulations provides that an accountholder who receives a final agency determination that his account is uninsured (or not fully insured) may obtain judicial review of that determination (12 C.F.R. 564.1(d)(5)).

2. In late 1983, petitioner purchased five CDs with a total face value of $1,241,000 from Empire Savings & Loan Association, a FSLIC-insured institution (Pet. App. A2 & n.1). On March 14, 1984, the Federal Home Loan Bank Board determined that Empire was insolvent and appointed the FSLIC as receiver (*id.* at A2). See note 1, *supra*. The FSLIC, in its separate corporate capacity, determined that petitioner was not entitled to federal insurance in the full amount of the CDs it had on deposit at Empire (*ibid.*). Accordingly, the FSLIC paid petitioner $100,000 and provided it with claim certificates to be presented in the Empire receivership proceedings for the remaining sum (*id.* at A2-A3).

Petitioner then instituted this action in the United States District Court for the Middle District of Pennsylvania

against the Bank Board and against the FSLIC, both in its capacity as receiver for Empire and in its corporate capacity.[2] Petitioner told the district court that it was suing the FSLIC only in its capacity as receiver for Empire and apparently sought to recover the uninsured portions of its accounts out of the assets of the Empire receivership (Pet. App. A27 n.4). Thus, the district court had no occasion to consider whether it had jurisdiction to entertain a claim against the FSLIC in its corporate capacity (*ibid.*). Instead, the district court accepted the FSLIC's position that claims against the receivership estate could be pursued only through the administrative claims process established for the resolution of such claims. See, *e.g.*, *North Mississippi Sav. & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). Accordingly, the district court granted the FSLIC's motion to dismiss petitioner's action for lack of subject matter jurisdiction (Pet. App. A26-A30).

3. Petitioner appealed the order of dismissal. On appeal, petitioner recharacterized its claim as a challenge to the insurance determination made by the FSLIC in its corporate capacity, rather than a claim against the assets of the Empire receivership. On that basis, the court of appeals, while suggesting its approval of the *Hudspeth* doctrine as applied to suits against the FSLIC in its receivership capacity, concluded that the district court erred in dismissing the action. Pet. App. A3-A5. The court of appeals held that petitioner was entitled to bring suit against the FSLIC in its corporate capacity as insurer of funds deposited with Empire (*id.* at A11). It therefore reversed

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[2] Petitioner also named as defendants two private parties, alleging that they had induced petitioner by fraud and misrepresentation to purchase the CDs. Petitioner settled its dispute with those parties, and they were dismissed from the action (Pet. App. A3 n.2).

the district court's judgment of dismissal and remanded for further proceedings.

The court of appeals also addressed the standard of review under which the district court was to evaluate petitioner's challenge to the FSLIC's denial of insurance coverage. The court concluded that the FSLIC's insurance determinations should be treated as final agency action subject to review under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. 706 (Pet. App. A10-A11). Judge Stapleton dissented from that determination (*id.* at A11-A15).

ARGUMENT

Petitioner contends that the court of appeals erroneously instructed the district court to consider petitioner's challenge to the FSLIC's insurance determination under standards set forth in the Administrative Procedure Act. The question of statutory construction that petitioner poses is obviously interlocutory and raises no conflict among the circuits. Furthermore, this Court's pending decision in *Coit Independence Joint Venture* v. *FSLIC*, cert. granted, No. 87-996 (Mar. 7, 1988), though involving a distinct issue, may bear on the eventual outcome of the instant matter. Thus, whatever the merits of petitioner's claim, it does not warrant this Court's review at this time.

It is well settled that this Court does not grant certiorari to review a non-final judgment in the absence of exceptional circumstances. *E.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). See generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 224-226 (6th ed. 1986). No such

circumstances exist here. The court of appeals' instruction that the district court should consider petitioner's claim under standards set forth in the APA does not involve any threshold jurisdictional issue. Compare *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949). Furthermore, it does not pose an "insuperable obstacle" to petitioner's maintenance of the suit. Compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938). To the contrary, petitioner may qualify for relief under the APA standards. And if petitioner does not so qualify, it may ask the court of appeals to revisit the question and reassess the applicability of the APA standards based on the record established in the district court.[3]

There is also no conflict among the circuits on this question of whether APA review is applicable to FSLIC's insurance determinations. Compare *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916).[4] In fact, the

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[3] Although the district court is bound by the decision of the court of appeals here, the law of the case doctrine would not bar the court of appeals from reconsidering the question after completion of the remand proceedings. See J. Moore, 1B *Moore's Federal Practice* ¶ 0.404[10], at 171-172 & n.11 (2d ed. 1988). And this Court would, of course, retain power to review the question on a subsequent petition for writ of certiorari. See *Hughes Tool Co.* v. *Trans World Airlines Inc.*, 409 U.S. 363, 365 n.1 (1973). Thus, petitioner's interlocutory posture is not dramatically different than if the district court itself had initially determined that the APA standards apply.

[4] Petitioner incorrectly (Pet. 7-8) claims that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1220 (1987), cert. dismissed, No. 87-451 (Nov. 7, 1988). However, *Morrison-Knudsen Co.* concluded only that the FSLIC, acting as receiver, may not adjudicate creditor claims against an insolvent savings and loan. The court's passing discussion of the FSLIC's role as insurer (811 F.2d at 1218 n.2, 1220) is—at most—dicta and, in any event, contained no mention of whether or not the APA standards are applicable in the in-

FSLIC's insurance determinations have generated relatively little litigation in recent years despite the unprecedented number of thrift failures; instead, the great bulk of the litigation in the present thrift crisis arises from *creditor* claims against failed thrifts. Thus, petitioner vastly overstates the importance of this case.[5]

Petitioner's description of the events below confirms that, even under petitioner's characterization of the case, review at the interlocutory stage would be particularly inappropriate here. Petitioner notes that "[t]he District Court never reached the standard of review of an FSLIC determination and created no record from which the Third Circuit reached its decision" (Pet. 15). Petitioner further asserts that the court of appeals "usurped the function of the District Court and based its decision on a clearly inadequate record" (*ibid.*). Obviously, if the record was inadequate to permit the court of appeals to resolve the standard

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surance context. Petitioner is similarly incorrect in asserting that the Fifth Circuit has "adopted the position of the Third Circuit [in this case]" (Pet. 8). The Fifth Circuit's discussion of the question in *Godwin* v. *FSLIC*, 806 F.2d 1290, 1292 (1987), is also dicta.

Petitioner relies heavily on *Jugum* v. *FSLIC*, 637 F. Supp. 1045 (W.D. Wash. 1986), vacated as moot, No. 87-3517 (9th Cir. July 21, 1987). Such a district court decision with no continuing precedential authority does not suggest that the issue merits the attention of this Court.

[5] The FSLIC is obligated to pay holders of insured deposit accounts "as soon as possible" after an institution's default (12 U.S.C. 1728(b)). For depositors who hold insured accounts containing less than the $100,000 maximum insurable amount, the payment is virtually automatic. Disputes typically arise only when (as here) a depositor claims that he is entitled to an insurance payment in excess of $100,000 or in other unusual circumstances. Thus, petitioner's contention that the court of appeals' decision "will effect the rights of all depositors of failed federally insured savings and loan associations" (Pet. 7) is not accurate.

of review issue, the record would be insufficient for this Court to address that issue as well. Accordingly, if this Court is to address the question at all, it should await a case that presents a satisfactory record for review.[6]

Finally, the pendency of *Coit Independence Joint Venture* v. *FSLIC*, No. 87-996 (argued on Nov. 1, 1988), also weighs against granting review in this case. The issue in *Coit*, which involves the FSLIC's administration of receivership claims, is distinct from the insurance issue here. Nonetheless, the Court's decision in *Coit* may influence petitioner's and the government's ultimate position in this case. We submit that it would be improvident to grant interlocutory review where the position of the litigants may be affected by the Court's forthcoming resolution of a pending case, particularly where, as here, the litigants will have an opportunity to discuss the relevance of the Court's decision in the course of future lower court proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] As we have explained (note 3, *supra*), if petitioner fails to prevail on its claim for relief in district court, it will have an opportunity to ask the court of appeals to reassess the applicability of the APA standards based on the record developed at trial.

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